

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

SHIRLEY FAIRBANKS,

Plaintiff,

V.

10 BANKERS LIFE AND CASUALTY
COMPANY, a foreign life insurance
11 company, and John Does No. 1-10.

Defendant.

NO: 13-CV-3064-TOR

**ORDER DENYING DEFENDANT'S
MOTION TO AMEND AND
GRANTING PLAINTIFF'S MOTION
TO REMAND**

BEFORE THE COURT is Defendant's Motion to Amend Notice of

15 Removal (ECF No. 5) and Plaintiff's Motion to Remand (ECF No. 8). This matter
16 was submitted for consideration without oral argument. The Court has reviewed
17 the briefing and the record and files herein, and is fully informed.

BACKGROUND

19 Shirley Fairbanks sued Bankers Life and Casualty Co., seeking \$71,768.21
20 in proceeds from a Bankers Life annuity policy to which she claims to be a

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1 beneficiary, as well as costs and attorney's fees. ECF No 1-1. Defendant removed
2 this action to federal court on the basis of diversity jurisdiction, then moved to
3 amend/correct its notice of removal to provide a detailed factual recitation and
4 legal analysis of the amount in controversy. ECF Nos. 1, 5 and 6. Plaintiff
5 contends that Defendant has failed to meet 28 U.S.C. § 1332's criteria, including
6 the amount-in-controversy requirement. ECF NO. 8 at 1.

DISCUSSION

8 The dispositive question before the Court is whether 28 U.S.C. § 1332's
9 amount-in-controversy requirement is met where Plaintiff requests \$71,768.21
10 under an annuity policy payout and unspecified attorney's fees.

11 Federal district courts have original jurisdiction in cases where (1) the
12 amount in controversy exceeds \$75,000, exclusive of costs and interest, and (2)
13 there exists complete diversity of citizenship between the parties. 28 U.S.C.
14 §1332(a). When the complaint does not specify a particular amount of damages,
15 “the removing defendant bears the burden of establishing, by a preponderance of
16 the evidence, that the amount in controversy” exceeds \$75,000. *Sanchez v.*
17 *Monumental Life Ins. Co.*, 102 F.3d 398, 403-404 (9th Cir. 1996). Defendants may
18 rely on facts presented in the removal petition and any “summary judgment type
19 evidence” relevant to the amount in controversy at the time of removal. *Matheson*
20 *v. Progressive Specialty Ins. Co.*, 319 F.3d 1089, 1090-91 (9th Cir. 2003)

1 (“[c]onclusory allegations as to the amount in controversy are insufficient.”).
2 Moreover, the court may consider this evidence even if it was not produced with
3 the original notice of removal. *Cohn*, 281 F.3d 837, 840 n.1 (9th Cir. 2002) (“[t]he
4 district court did not err in construing [Defendant’s] opposition as an amendment
5 to its notice of removal.”).

6 Generally, attorney’s fees are excluded in determining the amount in
7 controversy. *See Galt G/S v. JSS Scandinavia*, 142 F.3d 1150, 1156 (9th Cir. 1998)
8 (citing 14A C.Wright & A. Miller, Federal Practice and Procedure § 3712, at 178
9 (1985)). However, where attorney’s fees are authorized by contract or underlying
10 statute, “such fees may be included in the amount in controversy.” *Id.*

11 Here, even Defendant’s proposed amended Notice of Removal fails to
12 support an amount in controversy sufficient to meet the statutory requirement for
13 diversity jurisdiction. *See* ECF No. 6. Defendant contends that when attorney’s
14 fees are added to the policy value of \$71,768.21 the amount in controversy will
15 exceed \$75,000. ECF No. 6 at 4. However, the parties have not identified a statute
16 or contractual provision under which attorney’s fees may be appropriately added to
17 the value of the annuity policy. Though Plaintiff’s original claim in state court
18 requested costs and reasonable attorney’s fees, in addition to the payment of the
19 policy proceeds, it does not allege a violation of a statute or a contractual basis for
20

1 receiving attorney's fees. ECF No. 5-1 at 11. Nor does the Defendant specify a
2 contractual or statutory basis authorizing attorney's fees.

3 The Court notes that Defendant cites to a case in which relief was available
4 under the Washington Insurance Fair Conduct Act ("IFCA"), Wash. Rev. Code
5 48.30.015. ECF No. 6 at 4. However, Defendant does not directly contend that its
6 annuity policy is covered by the IFCA. Nor is the Court persuaded by a
7 preponderance of the evidence that the IFCA would apply to the annuity at issue in
8 this case. *See Babcock v. ING Life Ins. and Annuity Co.*, 2013 WL 24372 at *7 (the
9 Court could not identify any hazard or peril to be insured against with respect to an
10 annuity under a structured settlement, which would be necessary to categorize it as
11 an insurance contract under the IFCA). The IFCA provides that "[a]ny first party
12 claimant to a policy of insurance who is unreasonably denied a claim for coverage
13 or payment of benefits by an insurer may bring an action...to recover the actual
14 damages sustained...including reasonable attorneys' fees...." Wash. Rev. Code
15 48.30.015(1). The IFCA defines "first party claimant" as an "individual...asserting
16 right to a payment as a covered person under an insurance policy or insurance
17 contract arising out of the occurrence of the contingency or loss covered by such a
18 policy or contract." Wash. Rev. Code 48.30.015(4). Here, Plaintiff claims to be
19 the beneficiary of proceeds from an annuity policy. ECF No 1-01 at 2. Thus,
20 Defendant has not shown the annuity is the proper subject of the IFCA.

1 Therefore, Court finds that Defendant has not met its burden of showing the
2 amount in controversy in excess of \$75,000 as required for diversity jurisdiction
3 under 28 U.S.C. § 1332(a). Accordingly, this case is remanded to Yakima County
4 Superior Court.

5 **IT IS HEREBY ORDERED:**

6 1. Plaintiff's Motion to Remand, ECF No. 8, is **GRANTED**. This case is
7 **REMANDED** to Yakima County Superior Court. All pending motions
8 are **DENIED** as moot.

9 The District Court Executive is hereby directed to enter this Order,
10 furnish copies to counsel, mail a certified copy to the Clerk of the
11 Yakima County Superior Court, and **CLOSE** the file.

12 2. The Court **DENIES** Defendant's Motion to Amend its Notice of
13 Removal as moot.

14 The District Court Executive is hereby directed to enter this Order and
15 provide copies to counsel.

16 **DATED** September 20, 2013.



17 A handwritten signature in blue ink that reads "Thomas O. Rice".
18 THOMAS O. RICE
United States District Judge
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